

ARBITRATION ADVISORY

2015-02

The Arbitrator's Role In Settlements and Stipulated Awards

Replaces and Supersedes Arbitration Advisories 1996-05 and 2009-01

March 20, 2015

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INTRODUCTION

This advisory addresses situations where the parties are interested in settling, or have settled, their claims prior to or during Mandatory Fee Arbitration. Parties may have reached settlement before, or even during, MFA Arbitration, sometimes after evidence has been taken but before an award is issued. They may ask the arbitrator for an opportunity to mediate or negotiate settlement between themselves during the Arbitration. When the parties reach resolution, they may ask the Arbitrator to provide a Stipulated Award. On occasion, parties request that the Arbitrator serve as mediator, become involved in settlement discussions, or draft their settlement agreement. The Arbitrator may not become involved in settlement discussions, serve as a mediator or create a settlement agreement for the parties. This advisory addresses the balance between dispute resolution and MFA Arbitration. To ensure that the Arbitrator remains neutral, impartial, unbiased, avoids the practice of law throughout the process and does not lose arbitral immunity, this advisory attempts to recommend the best strategy for the Arbitrator in various settlement scenarios.

DISCUSSION

1. Mediation Under Mandatory Fee Arbitration

The State Bar encourages settlement of disputes. Settlement is permitted at any time prior to issuance of an Award in Mandatory Fee Arbitration. Thus, Business & Professions Code Sections 6200 et seq. permit the State Bar and local bar associations to mediate fee disputes under rules of procedure approved by the State Bar Board of Trustees. Programs that offer fee arbitration are not required to offer fee mediation, but those programs that do so must follow procedures to ensure that a trained mediator is assigned to the case and that the mediation

process is separate from the arbitration process. If mediation is unsuccessful in resolving the dispute, the MFA Rules require that arbitration be commenced.

2. The Arbitrator May Not Participate in Settlement Discussions

On occasion, the parties will ask the Arbitrator to step out of the adjudicative role and request that the Arbitrator mediate or provide settlement assistance. Arbitrators should never assist in settlement resolution.

Arbitral immunity under Bus. & Prof. Code §6200(f) is provided only to mediators and arbitrators who act “pursuant to rules of procedure approved by the [State Bar] board of trustees.” An arbitrator who participates in settlement negotiations before or during an arbitration may cause both the arbitrator *and* “the arbitrating association and its directors, officers and employees” to lose arbitral immunity.

Aside from loss of arbitral immunity, where an arbitrator participates in settlement discussions before arbitration, the arbitrator damages the process of arbitration because either party may perceive the arbitrator as biased based on actions taken by the arbitrator during settlement discussions, or because information may have been disclosed to facilitate mediation that would not have been given to the arbitrator during arbitration.

Arbitrators may consider suggesting as part of the Notice of Hearing that the parties discuss the possibility of settlement *prior* to arriving at the Arbitration to avoid involving the Arbitrator in settlement discussions. If the parties arrive and indicate they wish to discuss settlement, the Arbitrator must do one of the following:

- a) Provide the parties with another room to discuss settlement without the Arbitrator;
- b) Leave the room to allow the parties an opportunity to privately discuss settlement outside the presence of the Arbitrator; or
- c) Permit a continuance of the arbitration to allow the parties to seek mediated settlement discussions through the bar program under Mandatory Fee Arbitration Rules.

The Arbitrator may not, however remain with the parties or participate in settlement discussions in any way.

2. Drafting Settlements Reached Before or During Arbitration.

Parties often reach resolution just prior to or during MFA arbitration. The parties may seek to have the Arbitrator memorialize the settlement, dismiss the proceeding, or issue a Stipulated Award.

- a. An Arbitrator Should Not Draft a Settlement Agreement Reached by the Parties.

Parties who reach settlement prior to or during Arbitration often request that the Arbitrator draft or scribe the agreement. While nothing expressly prohibits an Arbitrator from scribing a settlement agreement in either the MFA Code or Model Rules, the Committee advises that doing so is inappropriate and Arbitrators should not do so. An Arbitrator who participates in drafting a settlement agreement risks being held to have represented the parties as an attorney, which would defeat immunity granted under the MFA statute.

Where an Arbitrator scribes the details of a settlement agreed upon by the parties, the Arbitrator never should offer legal advice, raise issues not addressed by the parties in their settlement, and should make clear that no advice will be given. Doing so exceeds the Arbitrator's role. Any settlement agreement should include the language from the State Bar minimum standards described below.

- b. The Program or Arbitrator May Dismiss the Proceeding But Should Notify the Parties that Their Ability to Enforce the Settlement both under CCP §1287.4 and Bus. & Prof. Code §6203(d) Will be Forfeited.

Following settlement, parties often seek formal dismissal of the MFA arbitration. While this may be permissible, depending on the rules of the local bar program, it can create unintended consequences. Code of Civil Procedure §1287.4 allows confirmation of an award in arbitration, and permits judgment to be entered on that award. The judgment has the same force and effect as a civil judgment. Code of Civil Procedure §1287.6 makes clear that without a confirmed award, the settlement agreement is merely a contract and is not enforceable by the court. Moreover, only an award in MFA mandating refund of fees or costs to the client carries the right of enforcement by the State Bar pursuant to Bus. & Prof. Code §6203(d). Thus a client entitled to reimbursement pursuant to settlement may be without valuable enforcement remedies where the case is dismissed without an award issued by the Arbitrator.

- c. The Arbitrator May Issue a Stipulated Award in Most Circumstances.

An Arbitrator may enter a Stipulated Award pursuant to Model Rule 19.1 of the State Bar (adopted by most local bar fee administration programs), discussed below. The State Bar Minimum Standards must be met, and the stipulated award should make clear that the award was reached after settlement between the parties.

1. Requirements of the Stipulated Award

The Arbitrator may prepare an award based on the settlement if asked to do so, but should use the "Award Pursuant to Stipulation of the Parties" form attached hereto. This form uses the award language required under the State Bar Minimum Standards and all local bar programs. All stipulated awards must meet the Minimum Standards, which require:

- The names of the parties;
- The total amount of the fees and costs charged and paid;
- A Statement of any unpaid or overpaid fees or costs;
- Pre-award interest, if any
- Post-award interest;
- Allocation of filing fees;
- The net amount and terms of payment of fees or costs, or both, if any is agreed, and who will make the payment;
- The responsible attorney; and
- Such other terms as are consistent with the jurisdiction and scope of the MFA program.

2. Limitations on the Stipulated Award

Bus. & Prof. Code §6203(a) requires a determination of all questions submitted to the panel. However, in a stipulated award there are no questions or determinations made by the

Arbitrator, other than the amount of fees and/or costs that are to be paid by one party to the other. Instead the Stipulated Award will indicate that the Award was reached after settlement.

There are limits to an Arbitrator's authority to issue a Stipulated Award. Most importantly, the Arbitrator may not issue a Stipulated Award if the Arbitrator believes the settlement is unethical, illegal or unconscionable. In such cases, the Arbitrator must either continue the hearing to allow the parties to remove unethical terms from their agreement, proceed with the arbitration or allow the parties mutually to dismiss the case in accordance with the program's rules. The Arbitrator may permit the parties to enter into two separate settlements as well. Settlement on all matters properly before the Arbitrator under the MFA would be entered as a Stipulated Award pursuant to and enforceable through the MFA Code. All other matters would be included in a private settlement outside of MFA, and the parties may pursue all rights they otherwise might have with respect to private settlements.

Moreover, the Arbitrator may not incorporate in the award any matters collateral to the arbitration that fall outside the scope of the Arbitrator's authority in Mandatory Fee Arbitration or that are inconsistent with the MFA statutes. The Arbitrator's authority is limited expressly by Bus. & Prof. Code §6200, et seq. If the Arbitrator does not have the authority under that statute to arbitrate the issue, he or she cannot include it in a Stipulated Award. Thus, if a settlement agreement reaches such matters, they must be expressly **excluded** from the Stipulated Award. Bus. & Prof. Code §6203(a).

These matters include:

- Attorney's fees and costs incurred in the MFA proceeding;
- Waivers of malpractice liability or resolution of malpractice claims,
- Granting of injunctive relief,
- Waivers of known and unknown claims [Civil Code § 1542],
- Agreements conditioned on the withdrawal of a State Bar disciplinary complaint or other proceeding,
- Agreements not to file for bankruptcy,
- Agreements to pay punitive damages,
- Waivers of future conflicts of interests,
- Granting or forfeiture of pecuniary interests such as liens on real or personal property,
- Consideration of fees that were set by statute, or
- Awards of fees beyond the statutorily permissible limits established in medical malpractice, federal tort claims, workers compensation, and social security actions.

Including any of these prohibited remedies exceeds the Arbitrator's authority, raising the possibility that the award must be vacated, or that the arbitrator and the program have lost arbitral immunity. See Arbitration Advisory No. 2007-01 for a discussion of arbitral immunity.

If the parties insist on provisions in the Stipulated Award that exceed the Arbitrator's authority, the Arbitrator should advise the parties of the limits of his or her arbitral authority under the program and allow them to reach a determination in an alternate proceeding, such as a stayed civil action or arbitration in another forum. The parties should be informed, however, that if the settlement involves a refund to a client, only an award following the limitations of Mandatory Fee Arbitration are afforded the protections of the MFA Code, including State Bar enforcement without further judicial intervention.

3. Arbitrators in MFA May Not Mediate Cases Assigned to Them.

Under Business and Professions Code §§6200 *et seq.*, the State Bar and local bar associations may offer mediation of fee disputes under rules of procedure approved by the State Bar Board of Trustees. While local bar programs offering MFA arbitration are not required to offer mediation programs, those local bar programs offering mediation must have procedures in place to ensure a fair and impartial mediation.

Where mediation through an MFA program is unsuccessful, the matter proceeds to Arbitration under program rules. To ensure impartiality and lack of bias in both proceedings, the Arbitrator assigned to the matter may not be the mediator. Business & Professions Code §6200(f) provides immunity to arbitrators and mediators for matters administered “pursuant to the rules of procedure approved by the [State Bar] board of trustees.” An Arbitrator in an MFA matter who also becomes involved either in mediation or negotiating the parties’ settlement agreement risks a waiver of arbitral immunity under §6200(f) - not only for the Arbitrator - but for the **“arbitration association and its directors, officers and employees”** as well. See, e.g., *Morgan Phillips, Inc. vs. JAMS/Endispute, L.L.C.* (2008) 140 Cal. App. 4th 795 (while not a mandatory fee arbitration case, it provides an excellent example of the loss of immunity from liability by both an Arbitrator and the arbitration program when the Arbitrator assumes the role of mediator and becomes personally involved in trying to settle a dispute.) [See Arbitration Advisory No. 2007-01 for further discussion on loss of arbitral immunity for Arbitrators]. Aside from loss of immunity, the Arbitrator who becomes involved in mediation or negotiating a settlement cannot return to arbitration because of the likely perception by at least one party that the Arbitrator now is biased. Lastly, the nature of mediation exposes a mediator to information and conduct inappropriate for an arbitrator. For instance, the parties often provide confidential information to the mediator, and the mediator often uses methods to encourage settlement appropriate for mediation but not arbitration.

If the parties would like to discuss settlement, Arbitrators may, in their discretion, allow the parties to discuss settlement outside the presence of the Arbitrator for a short period of time prior to commencing the arbitration. The parties also are permitted to attempt resolution at any time until the award is issued.

CONCLUSION

Arbitrators may not become involved in settlement discussions by serving as a mediator, assisting with settlement terms, offering settlement advice or drafting the terms of the settlement agreement. If a program offers mediation, the parties may participate in the mediation with another mediator, and, if it fails, return to MFA arbitration with the Arbitrator. Arbitrators are not prohibited from entering settlements reached during arbitration as stipulated awards, but must refrain from drafting or recommending terms to be included or offering legal advice or showing bias. The parties should draft the settlement themselves, using the Minimum Standards as a guide. Parties who wish to dismiss their claims in arbitration because a settlement has been reached should be advised that they will not be able to avail themselves of the enforcement mechanisms provided either by CCP §1287.4 (to enforce the settlement as a judgment in court), or Bus. & Prof. Code §6203(d) (allowing State Bar enforcement of refunds to clients). An Arbitrator may issue a Stipulated Award as long as (i) the Arbitrator does not believe the settlement is unethical, illegal or unconscionable; and (ii) the settlement and stipulated award do not exceed the Arbitrator’s authority under Bus. & Prof. Code §6200, *et seq.*

**AWARD OF THE _____ FEE ARBITRATION PROGRAM
PURSUANT TO STIPULATION OF THE PARTIES**

In the matter of the arbitration between:

Client

Case No. _____

Attorney

INTRODUCTION

This matter was assigned to the undersigned Panel Chair/was not assigned to a Panel Chair and this award is therefore signed by the Program Chair. The Petitioner was/was not represented by counsel, [TYPE NAME HERE]. The Respondent was/was not represented by counsel, [TYPE NAME HERE]. The parties entered into a written stipulated award to resolve their dispute which is the subject of this arbitration and submitted their stipulated award for incorporation in a binding fee arbitration award of this Program. GOOD CAUSE APPEARING THEREFORE:

AWARD

The STIPULATED AWARD attached hereto is incorporated herein by this reference, its terms and conditions are approved and made part of this binding award, and the parties are directed to perform its executory terms, all with the same force and effect as a binding award of this Program after an arbitration hearing.

Arbitrator Name (Print)

Arbitrator Name (Signature)

Dated

OR

Program Chair (Print)

Program Chair (Signature)

Dated

REMINDER: The award *must* be sent to the _____ Mandatory Fee Arbitration Program. DO NOT send it directly to the parties. The MFA Program will serve a copy of this award on the parties, and a photocopy will be sent to the arbitrator(s). Thank you.

STIPULATED AWARD

[USE THIS FORM WHERE THE PARTIES ARE SETTLING THEIR MATTER AFTER A HEARING HAS BEEN SET OR AT THE TIME OF HEARING]

1. The Parties agree that the total amount of fees, costs or both that should have been charged in this matter are: \$ _____
Of which the client has paid: \$ _____
The subtotal of fees still owed attorney or of any refund due client is: \$ _____

2. The Parties agree that pre-award interest
[] shall be awarded in the amount of \$ _____
[] shall not be awarded

3. The Parties agree that the arbitration filing fee of \$ _____
Which was paid by _____ shall be allocated:
Client: \$ _____
Attorney: \$ _____

4. The Parties agree that the net amount due to attorney or to client is \$ _____

5. Accordingly, the Parties agree that the following payment shall be made:

(a) Client, _____ shall pay attorney, _____
\$ _____

OR

(b) Attorney, _____ shall refund client, _____
\$ _____

The individual responsible attorney(s) is/are _____

OR

(c) Nothing further shall be paid by either attorney or client.

6. Payment terms, if any: _____

7. The Parties have read and understand the terms and conditions of this agreement and intend to be bound by this Stipulated Arbitration Award.

8. If any party to this agreement is an entity the individual executing this agreement represents that he or she has full authority and consent to enter into this agreement on behalf of such entity.

9. This is intended to be a fully integrated agreement that may not be modified other than in a writing signed by all parties.

Party Name (Print)

Signature of Party

Dated

Party Name (Print)

Signature of Party

Dated